

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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THOMAS RING,

Plaintiff-Appellant,

v

GAGE PRODUCTS COMPANY, INC.,

Defendant-Appellee.

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UNPUBLISHED

September 17, 1999

No. 208695

Oakland Circuit Court

LC No. 97-539605 CK

Before: Collins, P.J., and Jansen and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition of his claim for unpaid commissions pursuant to MCR 2.116(C)(7), and denying rehearing of his claim of unjust enrichment that was dismissed pursuant to MCR 2.116(C)(10). We affirm in part, reverse in part, and remand.

In May 1988, plaintiff, who was unemployed at the time, contacted Donald Dixon, defendant's president, and offered to help expand defendant's paint solvent business to include supplying paint-line cleaners to automotive manufacturers. For twenty years prior, defendant had been unable to gain entry into the paint-line cleaner market. Dixon allegedly offered plaintiff a \$55,000 per year salary, expenses, and a percentage of profits to work for defendant as a salesman, and plaintiff accepted. The employment agreement was never put in writing. After plaintiff secured a significant amount of business for defendant with Ford Motor Company, he was taken off that account and replaced by other salesmen employed by defendant. In October 1993, plaintiff was discovered to be in possession of sensitive, confidential pricing information regarding defendant's paint-line products. Although plaintiff claimed rightful possession of the documents, defendant terminated his employment. Plaintiff brought suit, alleging breach of contract, age discrimination, tortious interference with business relationships, nonpayment of commissions, and unjust enrichment. The trial court granted defendant's motion for summary disposition on each of those claims and denied plaintiff's request to amend his complaint to add a claim of equitable estoppel.

On appeal, plaintiff challenges the trial court's dismissal of his claims for unpaid commissions and unjust enrichment and argues that equitable estoppel bars the application of the statute of frauds.

Plaintiff first argues that the trial court erred in ordering summary disposition of his claim for unpaid commissions pursuant to MCR 2.116(C)(7) (statute of frauds) because the parties' agreement regarding commissions could be performed within one year. We review motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Specifically, whether the statute of frauds bars a contract claim is a question of law subject to de novo review on appeal. *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995). When a motion for summary disposition is premised on MCR 2.116(C)(7), the nonmovant's well-pleaded allegations must be accepted as true and construed in the nonmovant's favor. *Huron Tool and Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 376-377; 532 NW2d 541 (1995). The court must consider the pleadings, affidavits, and any other documentary evidence filed or submitted by the parties to determine whether there exists a genuine issue of material fact. *Id.* If no facts are in dispute, whether the claim is statutorily barred is a question of law for the court. *Id.*

An agreement that, by its terms, is not to be performed within one year of its making is void unless it is in writing and signed by the party against whom enforcement is sought. MCL 566.132(1)(a); MSA 26.922(1)(a); *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 441; 505 NW2d 275 (1993). If there is any possibility that an oral contract may be completed within a year, the agreement is not within the statute of frauds, even if the parties intended and thought it probable that it would extend over a longer period. *Hill v General Motors Acceptance Corp*, 207 Mich App 504, 509-510; 525 NW2d 905 (1994) (quoting *Drumme v Henry*, 115 Mich App 107, 111; 320 NW2d 309 (1982)).

Relying on *Drumme*, *supra*, we conclude that the alleged commission agreement in this case was capable of being performed within one year and thus plaintiff's claim for commissions was not barred by the statute of frauds. In *Drumme*, the plaintiff was a sales agent for the defendants and claimed that the defendants owed him commissions under an oral employment agreement. *Id.* at 109-110. Defendants denied the agreement and asserted the statute of frauds as an affirmative defense. *Id.* at 109. Following a jury verdict in the plaintiff's favor, the trial court granted the defendants' motion for directed verdict based on the statute of frauds. *Id.* at 110. This Court reversed and reinstated the jury verdict, stating in pertinent part:

. . . an oral employment contract not to be performed within one year of its making is unenforceable under the statute of frauds. Also, oral employment contracts for an indefinite term, in the absence of distinguishing features, are terminable at the will of either party. Being terminable at will, indefinite term employment contracts are not generally regarded as being within the statute since the possibility exists that the contract may be terminated in less than a year from its making. Finally, we note that, *if there is any possibility that an oral contract is capable of being completed within a year, it is not within the statute of frauds, even though it is clear that the parties may have intended and thought it probable that it would extend over a longer period and even though it does so extend.*

\* \* \*

Viewing the testimony in the light most favorable to plaintiff, the trial court's finding is not supported by the record. We have not been able to find, nor have defendants directed us to, *anything in the record which indicates that the parties understood that plaintiff could not secure any sales within one year of the agreement*. Thus, the premise upon which the trial court based its decision is clearly erroneous. The evidence indicates that plaintiff's job consisted of servicing accounts and making new sales. While arguably it may have been unlikely that plaintiff would make any new sales within one year, there certainly was a possibility that the contract was capable of performance within one year. Thus, even though the parties may have intended the contract to last longer than a year, it is not unenforceable under the statute of frauds. [*Id.* at 111-112. Emphasis added; citations omitted.]

The trial court's determination in the instant case that plaintiff was employed at-will is not challenged on appeal. At-will employment contracts generally do not fall within the statute of frauds. *Id.* at 111. Further, as in *Drummey*, there is no evidence in the record before us that plaintiff could not have secured sales within one year. Thus, there was a possibility that the oral contract was capable of being completed within a year. *Id.*

Citing *Dumas v ACIA*, 437 Mich 521; 473 NW2d 652 (1991), the trial court concluded that the agreement could not have been performed within one year on the basis that plaintiff's complaint asserted he was owed commissions for years subsequent to his termination, and plaintiff testified at deposition that Dixon "discussed a different percentage with him every year that the plaintiff worked for defendant." However, plaintiff testified at deposition that he was not promised he would be paid commissions after he left his employment, and on appeal argues he is entitled to post-termination compensation, i.e., years subsequent to 1993, only under an unjust enrichment theory. Indeed, plaintiff's claim for commissions for subsequent years was dismissed by the court before it ruled on the statute of frauds issue. Thus, this case differs from *Dumas*, which involved claims for commissions on *renewal* policies. Furthermore, Dixon's attempts to renegotiate the alleged commission arrangement, and the circumstance that the agreement, in fact, lasted for more than a year, do not alter that the agreement was capable of being performed within a year.<sup>1</sup> *Drummey, supra*. Accordingly, we conclude that the trial court erred in granting summary disposition to defendant on plaintiff's unpaid commission claim as to the years during which plaintiff was employed.

Plaintiff also argues that the principles of equitable estoppel bar the application of the statute of frauds and that the trial court erred in denying his motion to amend his complaint to add a claim of equitable estoppel. However, because we find that the statute of frauds does not apply to plaintiff's alleged commission agreement, we need not reach the issue of whether the court erred in denying plaintiff's motion to amend.

Finally, plaintiff argues that the trial court erred in dismissing his claim of unjust enrichment pursuant to MCR 2.116(C)(10). Again, we review a motion for summary disposition de novo. *Spiek, supra* at 337. A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Id.* This Court reviews the record evidence in the same manner as the trial court, giving the benefit of doubt to the nonmoving party, to determine whether there exists a genuine

issue of material fact that would prevent entering a judgment for the defendant as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998).

Plaintiff argues that because he enabled defendant to enter the paint-line cleaner market and to secure substantial contracts with Ford Motor Company, and after defendant fired him, defendant enjoyed the benefits of those contracts, defendant was unjustly enriched at his expense. Under the equitable doctrine of unjust enrichment, a person unjustly enriched at the expense of another is required to make restitution. *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 185; 504 NW2d 635 (1993). In such instances, the law implies a contract to prevent unjust enrichment. *Martin v East Lansing Sch Dist*, 193 Mich App 166, 177; 483 NW2d 656 (1992). However, the law will not operate to imply a contract to avoid unjust enrichment if there is an express contract covering the same subject matter. *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993); *Martin, supra*. The essential elements of a claim of unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because the defendant retained the benefit. *Barber, supra*.

There is no evidence that plaintiff acted outside the scope of his employment agreement in securing business on defendant's behalf. Plaintiff admits that he was hired for the express purpose of helping defendant to gain access to the paint-line cleaner market and that he received compensation in exchange for that service. Therefore, there is no evidence that defendant's continued service of the accounts originally secured by plaintiff has resulted in any inequity or that defendant has been unjustly enriched. The trial court properly granted summary disposition in favor of defendant on plaintiff's claim of unjust enrichment.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jeffrey G. Collins

/s/ Kathleen Jansen

/s/ Helene N. White

<sup>1</sup> We note also that any perceived lack of specificity with regard to the terms of the alleged agreement does not provide an alternate basis for affirming the trial court's dismissal of the commission claim. In the context of denying plaintiff leave to amend his complaint to allege equitable estoppel, the trial court stated that "the terms of the promise to pay commissions to plaintiff were neither definite nor clear." The court observed that plaintiff's complaint stated he would receive a four percent commission and that he testified at deposition that the figure was five percent, also noting that plaintiff wavered on whether the commission was on profits, revenues, or sales, and that plaintiff testified he and Dixon discussed a different percentage every year. Notwithstanding these inconsistencies, plaintiff presented sufficient evidence to raise a genuine issue of fact whether a commission agreement existed.

Plaintiff supported his argument below that a genuine issue of fact remained regarding whether there was a commission agreement with documents defendant had generated: (1) a letter dated January 2, 1992 from defendant's accounting manager to a mortgage company verifying plaintiff's employment since May 1988 and stating that "[h]is base salary is \$55,000.00 annually *plus a commission bonus based upon sales and profitability*," and (2) a computer generated printout stating figures for gross revenue, net revenue pre-commission, and commission "@ 5% gross," of plaintiff's division for 1989, 1990, and 1991. Furthermore, in response to plaintiff's interrogatory requesting the amounts of commission bonus paid to plaintiff in the years from 1989 through 1993, and defendant's sales and profitability for those years, defendant answered:

Any sales data used in calculating a bonus would be the *gross sales* for the line-cleaning related Specialty Products.

Any profitability data used in calculating a bonus would be the profitability for the line-cleaning related Specialty Products.

There was no precise arithmetic formula used each year for bonuses.

At this time, Defendant is unable to provide the dollar figure for "sales" and "profitability" for the periods listed.

The above referenced documents and testimony adequately support plaintiff's deposition testimony that there was an agreement for 5% commission on gross revenues such that summary disposition is precluded. Further, plaintiff's deposition testimony that Dixon *discussed* changing the commission terms does not foreclose there having been an agreement.